Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

JAMES R. CARROLL and DOROTHY A. CARROLL,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTION PRESENTED

Should this Court grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, which that Court acknowledged was an issue on which the circuits are divided, to wit: Whether the common law "mailbox rule," under which proof of the mailing of a properly addressed communication bearing proper postage raises a rebuttable presumption of receipt in due course by the addressee, is a rule that applies to matters sent to the Internal Revenue Service by regular mail?

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COMMISSIONER OF INTERNAL REVENUE,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, James R. Carroll and Dorothy A. Carroll, respectfully pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered on December 26, 1995.

OPINIONS BELOW

The United States Tax Court denied Petitioners' Petition for a redetermination of a deficiency set forth by Respondent, based upon Respondent's contention that Petitioners had not timely filed the necessary form. By Order and Decision of May 24, 1994, the United States Tax Court determined a deficiency of $22,479.25 with respect to the 1988 federal income tax liability of Petitioners. On December 26, 1995, the United States Court of Appeals for the Sixth Circuit affirmed the lower court's decision, holding that it was bound by circuit precedent to do so. (App. 1-9).

JURISDICTION

Judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 26, 1995. This Court's jurisdiction to consider this Petition from the final Judgment of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254.

STATUTORY PROVISIONS

(a) 26 U.S.C. 7502(a)(1):

> If any return, claim, statement, or other document required to be filed, or any payment required to be made, within a prescribed

period or on or before a prescribed date under authority of any provision of the internal revenue laws is, after such period or such date, delivered by United States mail to the agency, officer, or office with which such return, claim, statement, or other document is required to be filed, or to which such payment is required to be made, the date of the United States postmark stamped on the cover in which such return, claim, statement, or other document, or payment, is mailed shall be deemed to be the date of delivery or the date of payment, as the case may be.

(b) 26 U.S.C. 7502(c)(1):

For purposes of this section, if any such return, claim, statement, or other document, or payment, is sent by United States registered mail --

> (A) such registration shall be prima facie evidence that the return, claim, statement, or other document was delivered to the agency, officer, or office to which addressed, and
>
> (B) the date of registration shall be deemed the postmark date.

STATEMENT OF THE CASE

Petitioner James R. Carroll acquired control of a Tennessee corporation, late in the year 1986. He determined to exercise the election permitted by the Internal Revenue Code to have the corporation taxed as an "S corporation." Thereafter, IRS Form 2553 (the "Form") was duly prepared, signed by Petitioner, and given by Petitioner to his secretary for mailing. In order to effectively elect S corporation tax treatment for the calendar year 1987, the Form was required to be filed with Respondent no later than Monday, March 16, 1987.

Petitioner Carroll's secretary put the signed Form in a properly addressed envelope, affixed the necessary postage, and handed the envelope to a messenger who made a special trip with it to a United States post office in Knoxville, Tennessee. The envelope was duly deposited in a mail receptacle inside the post office. The Tax Court subsequently found as a fact that the signed Form had been mailed to the IRS on January 21, 1987.

While not challenging the Tax Court's finding that the Form was properly mailed 54 days before the filing deadline, the IRS has not been able to locate the original Form, and its records therefore do not indicate that the Form was ever filed.

Petitioners filed a joint federal income tax return for 1987, in which they claimed a pass-through loss with respect to the corporation. The claimed loss was disallowed by the IRS on the ground that there had been no election to have the corporation treated as an S-corporation in 1987, which disallowance resulted in a finding of a tax deficiency for 1988.

The United States Tax Court had jurisdiction over this matter pursuant to 26 U.S.C. §7442. The Tax Court conducted a hearing and found that the election Form had been mailed to the IRS on January 21, 1987. Because the Form had not been sent by registered or certified mail, however, and because the United States Court of Appeals for the Sixth Circuit refuses to apply the common law "mailbox rule," which would have created a presumption that the IRS received the mailing prior to March 16, 1987, the Tax Court concluded that the evidence was insufficient to prove a timely filing of the Form. Accordingly, the Tax Court decided that there was a deficiency of $22,479.25 in the Petitioner's 1988 federal income tax.

On appeal, the United States Court of Appeals for the Sixth Circuit noted that, with the enactment of 26 U.S.C. §7502(a), Congress provided that a document mailed to the IRS on or before a filing date and delivered by the postal service after the deadline would be deemed received on the date of the postmark. Congress went on to say in §7502(c)(1)(A) that a showing that the document had been sent by registered mail would constitute prima facie evidence of delivery to the IRS.

The subject statute was silent as to the result where, as here, a taxpayer could prove that a document had been timely mailed to the IRS, but because of the loss of the document -- and because of the use of regular mail rather than registered or certified mail -- the taxpayer could offer no direct proof that the document had been postmarked on or before the filing deadline and actually delivered to the IRS.

The question for the Court of Appeals was whether the subject statute had the effect of repealing the common law "mailbox rule," by which proof of the mailing of a

properly addressed envelope bearing proper postage raises a rebuttable presumption of receipt in due course by the addressee. The Court acknowledged a split among the circuits as to whether this question should be answered affirmatively or negatively, and it concluded that in the Sixth Circuit precedent bound it to answer affirmatively. The decision of the Tax Court, accordingly, was upheld.

REASONS FOR GRANTING THE WRIT

The various circuits of the United States Court of Appeals are in conflict with respect to an important federal question presented to this Court. The question is important because it can affect any taxpayer in the United States of America to that taxpayer's economic detriment.

In its Opinion below, the United States Court of Appeals for the Sixth Circuit reviewed the division among the circuits with respect to this important question. It carefully considered the decision of *Wood v. Commissioner*, 92 T.C. 793 (1989) (en banc), *aff'd* 909 F.2d 1155 (8th Cir. 1990). In *Wood*, *supra*, the Tax Court rejected the proposition that, under 26 U.S.C. §7502, delivery of mail which the IRS has not been able to locate can be proved only by producing a receipt for registered or certified mail. The Tax Court concluded that a Congressionally sanctioned, assured method of proof ". . . does not in law or logic forbid any other method unless Congress expressed intent to exclude other methods. No such expression exists." *Id.* At 798.

The Court of Appeals for the Eighth Circuit affirmed the Tax Court's decision in *Wood*, *supra*, applying the principle that "[w]hen interpreting a statute, we must consider the statute in light of judicial concepts [in this case, the common law presumption of delivery] existing before it . . . was enacted." 909 F.2d at 1160, as quoted in App., page 6, herein.

The Court of Appeals in *Wood*, *supra*, further noted that Congress must be supposed to have known of the common law presumption of delivery, and that if "Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Id.*, quoting *Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986).

The position taken in *Wood*, *supra*, has been adopted by the United States Court of Appeals for the Ninth Circuit in *Anderson v. United States*, 966 F.2d 487 (9th Cir. 1992). In that Opinion, the Court said the following:

> . . .We agree with the Eighth Circuit that enactment of Section 7502 did not displace the common law presumption of delivery. The statute itself does not reflect a clear intent by Congress to displace the common law mailbox rule [under which proper and timely mailing of a document raises a rebuttable presumption that it is received by the addressee]. At 491.

This position has not been followed by the Sixth Circuit. It held in *Miller v. United States*, 784 F.2d 728 (1986), that the only exceptions to the physical delivery rule are the two set out in §7502. In reaching its decision, the Sixth Circuit cited *Deutsch v. Commissioner of Internal Revenue*, 599 F2d 44 (2nd Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980).

In its Opinion below, the Sixth Circuit notes that it was invited recently to reconsider *Miller*, *supra*, in an en banc proceeding. A three judge panel refrained from any expression of opinion as to the soundness of contrary decisions, and concluded that the clear precedent in its circuit bound it to reject the common law "mailbox rule." The Court was petitioned for a rehearing en banc on the question, and a number of the judges (including the author of the decision below) voted in favor of rehearing, although the number was less than a majority.

With obvious regret, the decision below by the United States Court of Appeals for the Sixth Circuit states the following:

> If the Carrolls [Petitioners] had been residents of any state other than Tennessee, Kentucky, Ohio, Michigan, Connecticut, New York, or Vermont, the Tax Court would have allowed them to invoke the presumption of delivery and would have decided this case in their favor. Because the Carrolls live in Tennessee, however, the presumption of

> delivery does not work for them. (App., page 9).

This Court should review this decision and exercise its authority to achieve uniformity among the conflicting circuits as to whether the common law "mailbox rule" applies to matters sent to the Internal Revenue Service by regular mail. The result for these Petitioners, according to the appellate Court below, is in conflict with 43 other states in this Union, and that conflict can only be resolved by this honorable Court. Taxpayers such as these Petitioners should not be subjected to differing treatment as to this important question, based solely upon where they happen to reside.

CONCLUSION

For all of the reasons stated, Petitioners, James R. Carroll and Dorothy A. Carroll, respectfully pray that this Court grant a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

The Taylor Law Firm

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing pleading has been served upon all counsel of record by placing same in the United States mail, properly addressed and with sufficient postage affixed thereto to ensure delivery this 22nd day of March, 1996.

Dudley W. Taylor

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1995 FED App. 0379P (6th Cir.)
File Name: 95a0379p.06

No. 94-1938

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES R. CARROLL and
DOROTHY A. CARROLL,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

} ON APPEAL from the United States Tax Court

Decided and Filed December 26, 1995

Before: MILBURN and NELSON, Circuit Judges; MORTON, District Judge.*

DAVID A. NELSON, Circuit Judge. This is a tax case that presents an issue on which the circuits are divided:

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*The Honorable L. Clure Morton, United States District Judge for the Middle District of Tennessee, sitting by designation.

whether the common law "mailbox rule," under which proof of the mailing of a properly addressed communication bearing proper postage raises a rebuttable presumption of receipt in due course by the addressee, is a rule that applies to matter sent to the Internal Revenue Service by regular mail. Circuit precedent requires us to hold that the common law rule has no application where the IRS is involved. In this circuit, a taxpayer who sends a document to the IRS by regular mail, as opposed to registered or certified mail, does so at his peril.

I

On November 8, 1986, petitioner James R. Carroll, a resident of Knoxville, Tennessee, purchased the stock of a Tennessee corporation known as Volunteer Distribution Co. Mr. Carroll decided to elect "S-corporation" tax status for Volunteer, so that the earnings and losses of the corporation would be passed through to him as owner. The appropriate election form (IRS Form 2553) was duly signed by Mr. Carroll as an officer of the electing corporation and as the consenting stockholder.

Mr. Carroll signed the form on January 21, 1987. If it were to be effective for the tax year at issue here, the signed form had to be filed with the IRS no later than Monday, March 16, 1987.

Mr. Carroll arranged to have the form mailed to the IRS Service Center in Memphis, Tennessee, on the same day the form was signed. His secretary put the signed form in a properly addressed envelope, affixed the necessary postage, and handed the envelope to a messenger who made a special trip with it to the Knoxville post office. The messenger deposited the envelope in a mail receptacle inside the post office. The Tax Court subsequently found as a fact, following an evidentiary hearing, that the signed form had been mailed to the IRS on January 21, 1987.

The IRS does not challenge the accuracy of Tax Court's factual finding that the signed form was properly mailed to the Memphis Service Center some 54 days before the filing

deadline. Unfortunately for Mr. Carroll and his wife, however, the IRS has not been able to locate the original form. The records of the Memphis Service Center do not indicate that the form was ever filed.

When asked at the hearing if forms are ever lost at the service center, a representative of the IRS responded with an unqualified "yes." The IRS witness gave the same answer to a question about the loss of tax returns.[1] If Mr. Carroll's Form 2553 was not lost in the mail by the United States Postal Service, it seems virtually certain that the form was lost at the service center by the IRS.

Mr. Carroll and his wife filed a joint federal income tax return for 1987 in which they claimed a pass-through loss with respect to Volunteer Distribution Co. The claimed loss, which was carried over to the Carrolls' 1988 return, was disallowed by the IRS on the ground that there had been no election to have Volunteer treated as an S-corporation in 1987. The disallowance resulted in the finding of a tax deficiency for 1988.

Mr. and Mrs. Carroll filed a petition in the Tax Court seeking a redetermination of the deficiency. The Tax Court conducted a hearing, as noted above, and found that the S-corporation election form had been mailed to the IRS on January 21, 1987. Because the form had not been sent by registered or certified mail, however, and because the United States Court of Appeals for the Sixth Circuit (the court to which an appeal from the Tax Court decision would lie) refuses to apply the rule under which there would have been a presumption that the IRS received the mailing prior to March 16, 1987 (see *Miller v. United States*, 784 F.2d 728 (6th Cir. 1986), and *Surowka v. United States*, 909 F.2d 148 (6th Cir. 1990), tax cases rejecting the common law mailbox rule), the Tax Court

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[1] An in-house IRS study described in an article published in the *Washington Post* on February 19, 1989, reportedly found that the IRS loses about two million tax documents from its files each year.

concluded that the evidence was insufficient to prove a timely filing of the form. The Tax Court decided that there was a deficiency of $22,479.25 in the Carrolls' 1988 federal income tax, and the Carrolls have appealed that decision to this court.

II

Prior to 1954, all documents mailed by a taxpayer to the Internal Revenue Service were considered to have been "filed" with the agency at the time of actual receipt. See *United States v. Lombardo*, 241 U.S. 73, 76 (1916). Federal courts routinely applied the common law presumption that properly mailed documents would actually be received in due course by the addressee, see *Estate of Wood v. Commissioner*, 92 T.C. 793, 798-99 (1989) (en banc), *aff'd*, 909 F.2d 1155 (8th Cir. 1990) (citing numerous cases), but unless same-day delivery was in fact the norm, receipt by the addressee was not deemed to have occurred on the same day as the mailing. The presumption seems to have been that the addressee would receive the material after a normal interval -- two or three days, *e.g.*, under current Postal Service norms.

Congress altered the actual-receipt rule with the enactment of 26 U.S.C. §7502 in 1954. In §7502(a) Congress said that a document mailed to the IRS on or before a filing deadline and delivered by the Postal Service after the deadline would be "deemed" to have been received on the date of the postmark if the postmark itself was not after the deadline. And for purposes of §7502, Congress went on to say in §7502(c)(1)(A), a showing that the document had been sent by registered mail would constitute prima facie evidence of delivery to the IRS. The date of registration -- again "[f]or purposes of this section" -- would be deemed the postmark date. §7502(c)(1)(B).

The statute was silent as to what the result would be where, as here, a taxpayer could prove that a document addressed to the IRS had been placed in the mails, with postage attached, well before the filing deadline, but

because of the subsequent loss of the document by the government -- and because of the use of regular mail, rather than registered or certified mail -- the taxpayer could offer no direct proof that the document had been postmarked on or before the filing deadline and had actually been delivered to the IRS. Before the statute was passed, as we have seen, the taxpayer could rely on the common law presumption of delivery. Did the statute have the effect of repealing the presumption in all cases other than those where registered or certified mail was used?

In *Wood, supra*, the Tax Court squarely rejected the proposition that 26 U.S.C. §7502 means that delivery of mail which the IRS has not been able to locate can be proved only by producing a receipt for registered or certified mail. In *Wood*, as in the case at bar, an election form was sent to the IRS by regular mail. The petitioner in *Wood* offered unimpeachable proof of mailing, just as the Carrolls did in the case at bar, but the IRS claimed that the election form had never been received. The *Wood* document was mailed on the Friday before a Monday filing deadline, and the postmaster to whom the document had been handed for mailing testified that she promptly postmarked the envelope before placing it in a sack of outgoing mail. This proof that the postmark was affixed on Friday meant that Friday would be deemed the date of delivery, under 26 U.S.C. §7502(a), but only if the document had actually been delivered by the Postal Service to the IRS. Because the petitioner had not used registered mail, the prima facie evidence of delivery referred to in §7502(c)(1) (*i.e.*, proof of registration) could not be produced. The IRS argued that §7502(c) was "the *exclusive* means of proving delivery," but the Tax Court rejected this argument and concluded that §7502(c) was merely a "safe harbor." *Wood*, 92 T.C. at 797-98 (emphasis by the court).

"The provision for Congressionally sanctioned, assured method of proof," said the Tax Court in *Wood*, ". . . does not in law or logic forbid any other method unless Congress expressed intent to exclude other methods. No

such expression exists. There is no language in section 7502 or its legislative history to suggest that Congress intended section 7502(c) to be the only way to prove delivery." *Id.* at 798. Delivery could be shown under the rule -- "well-settled" since the Supreme Court's decision in *Rosenthal v. Walker*, 111 U.S. 185 (1884) -- "that, absent contrary proof of irregularity, proof of a properly mailed document creates a presumption that the document was delivered and was '*actually* received by the person to whom it was addressed.'" *Wood*, 92 T.C. at 798, quoting *Hagner v. United States*, 285 U.S. 427, 430 (1932) (emphasis by the *Wood* court).

In affirming the Tax Court's decision in *Wood*, the Court of Appeals for the Eighth Circuit applied the familiar principle that "[w]hen interpreting a statute, we must consider the statute in light of judicial concepts [in this case, the common law presumption of delivery] existing before it . . . was enacted." 909 F.2d at 1160. Congress must be supposed to have known of the common law presumption of delivery, the court said, and "[t]he normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." *Id.*, quoting *Midlantic Nat'l Bank v. New Jersey Dep't of Environmental Protection*, 474 U.S. 494 (1986), as quoted in *Stillians v. State of Iowa*, 843 F.2d 276, 280 (8th Cir. 1988). "[A]bsent a clear manifestation of contrary intent," in other words, "a newly-enacted or revised statute is presumed to be harmonious with existing law . . . ." *Wood*, *id.*, quoting *Johnson v. First Nat'l Bank of Montevideo*, 719 F.2d 270, 277 (8th Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984). The common law presumption of delivery applied against the IRS before the enactment of §7502, and the Eighth Circuit saw "no reason" why it should not continue to apply against the IRS afterward. *Wood*, 909 F.2d at 1159.

As the Eighth Circuit recognized, the holding in *Wood* probably cannot be reconciled with the holding of the Sixth Circuit in *Miller v. United States*, 784 F.2d 728 (1986). In

Miller, as in *Wood*, a taxpayer sought to invoke the judicially-created presumption that "material mailed is material received." *Miller*, 784 F.2d at 730. As in *Wood*, the plaintiff in *Miller* maintained that §7502 was a "safe harbor" that did not bar reliance on the judicially created presumption. *Id.* This court disagreed. Citing *Deutsch v. Commissioner of Internal Revenue*, 599 F.2d 44, 46 (2d Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980), where the Second Circuit construed §7502 as demonstrating "a penchant for an easily applied, objective standard," the *Miller* panel concluded that "the *only* exceptions to the physical delivery rule . . . are the two set out in section 7502 . . . ." *Miller*, 784 F.2d at 731 (emphasis supplied).[2]

In *Wood* the Eighth Circuit recognized the broad sweep of *Miller* and *Deutsch*, but simply disagreed with the holdings of those cases. "To the extent that the Sixth and Second Circuits in *Miller* and *Deutsch* hold that a presumption of delivery can *never* be used to satisfy the requirement of delivery in section 7502(a)(1), we disagree." *Wood*, 909 F.2d at 1159 (emphasis in original).

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[2] In effect, the two statutory exceptions make the filing complete at the time a mailing is postmarked, regardless of the time of actual delivery, if (1) the IRS acknowledges receipt of the document with a postmark that is not later than the filing deadline, or (2) the document is sent by registered mail, and the date of registration -- which is equated by statute with the postmark date -- is not later than the filing deadline.

Strictly speaking, of course, the taxpayers in the case at bar are not contending that they come within a judicially created "exception" to the rule that a filing is complete only at the time of actual delivery to the IRS. The taxpayers contend, rather, that when they proved that their S-corporation election form was mailed to the IRS 54 days in advance of the filing deadline, they made a prima facie showing of timely receipt -- actual receipt, not constructive receipt -- by the agency. Like the Eighth Circuit, we are satisfied that the contention is inconsistent with *Miller*. See *Surowka v. United States*, 909 F.2d 148 (6th Cir. 1990), where *Miller* was interpreted as ruling out "circumstantial proof" of timely filing where neither of the statutory exceptions applied.

The Ninth Circuit has also disagreed with the Second and Sixth Circuits on this point. In *Anderson v. United States*, 966 F.2d 487, 491 (9th Cir. 1992), the court expressed itself as follows:

> ". . . we agree with the Eighth Circuit that enactment of section 7502 did not displace the common law presumption of delivery. The statute itself does not reflect a clear intent by Congress to displace the common law mailbox rule [under which proper and timely mailing of a document raises a rebuttable presumption that it is received by the addressee]."

Both *Miller* and *Surowka* were cited in *Anderson*, but neither was found to be persuasive.

Our court was invited, not long ago, to reconsider *Miller* and *Surowka* in an en banc proceeding. The recent case of *BMC Bankcorp, Inc. v. United States*, No. 94-5842 (6th Cir. June 15, 1995), presented the question whether a taxpayer who did not come within the terms of §7502 could avail himself of the common law presumption that material properly mailed to the IRS will, in the normal course of time, be delivered. Refraining from any expression of opinion as to the soundness of the Eighth and Ninth Circuit decisions contrary to *Miller* and *Surowka*, a three-judge panel concluded that the clear precedent in this circuit required a negative answer. The taxpayer petitioned for rehearing en banc, and the active members of the court were polled on whether to grant the petition. A number of judges voted in favor of rehearing (it may come as no surprise to the attentive reader that the author of the present opinion was among them), but the number was less than a majority. See order of October 10, 1995, denying the petition. Unless the Supreme Court or Congress should decide otherwise, therefore, *Miller* and *Surowka* will remain good law in the Sixth Circuit.

Mr. and Mrs. Carroll argue that their situation is different from that of the taxpayers in *Miller* and *Surowka* because here there is "compelling" evidence, over and above any common law presumption, that their Form 2553

was in fact received by the IRS. The evidence consists of a preprinted address label supplied by the IRS for use on Volunteer's 1987 tax return. The label bears a new employer identification number, and the Carrolls contend that the issuance of the new number proves that the S-corporation election form was received by the IRS. In support of this contention the Carrolls cite our unpublished opinion in *Trimarco v. United States*, No. 91-3453 (6th Cir. February 18, 1992).

In *Trimarco* the taxpayer mailed the IRS a transmittal letter accompanied, according to the letter, by both an S-corporation election form and a form applying for an employer identification number. The IRS subsequently issued the employer identification number, and we inferred from this that the taxpayer's communication did not miscarry in the mails.

The case at bar is different. Here the S-corporation election form was *not* accompanied by a request for an employer identification number. Issuance of the number, accordingly, does not prove receipt of the election form. Unless the Carrolls can invoke the common law mailbox rule, with its non-statutory presumption of delivery, they must lose their case.

If the Carrolls had been residents of any state other than Tennessee, Kentucky, Ohio, Michigan, Connecticut, New York, or Vermont, the Tax Court would have allowed them to invoke the presumption of delivery and would have decided this case in their favor. Because the Carrolls live in Tennessee, however, the presumption of delivery does not work for them. Having failed to use registered or certified mail when they sent the Form 2553 to the IRS, the Carrolls must pay an additional $22,479.25 in taxes.

AFFIRMED.

Supreme Court, U.S.
FILED

95 1601 MAR 2 5 1996

No. OFFICE OF THE CLERK

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JAMES R. CARROLL and DOROTHY A. CARROLL,

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL APPENDIX

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27 pp

T.C. Memo. 1994-229

UNITED STATES TAX COURT

JAMES R. CARROLL AND DOROTHY A. CARROLL,
Petitioners v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 15964-91. Filed May 24, 1994.

Dudley W. Taylor, for petitioners.

William W. Kiessling, for respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

BEGHE, Judge: Respondent determined a deficiency of $19,179.25 in petitioners' 1988 Federal income tax. The

deficiency was attributable to respondent's disallowance of a $58,119 subchapter S pass-through loss reported on petitioners' 1987 income tax return and carried over to their 1988 income tax return as part of a net operating loss. By amendment to answer, respondent alleged an increase in deficiency attributable to disallowance of a $10,000 subchapter S pass-through section 179[1] expense deduction that was reported on petitioners' 1987 income tax return and carried over to their 1988 income tax return as part of the net operating loss. The disallowance of the pass-through section 179 expense deduction increased the deficiency to $22,479.25.

The sole issue for decision is whether Volunteer Distribution Co. (Volunteer) timely filed Form 2553, Election by a Small Business Corporation, which would entitle petitioners to deduct the 1987 pass-through loss and section

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[1] All section references are to the Internal Revenue Code in effect for 1987, and all Rule references are to the Tax Court Rules of Practice and Procedure.

179 expense deduction of Volunteer. We find that Volunteer did not timely file Form 2553.

FINDINGS OF FACT

The parties have stipulated some of the facts, and the Stipulation of Facts and attached exhibits are incorporated in this opinion.

James and Dorothy Carroll (petitioners) resided in Knoxville, Tennessee, when they filed their petition. For 1986, 1987, and 1988, they treated Volunteer as an S corporation and included its pass-through income or loss and pass-through deductions on their Forms 1040 for those years.

Volunteer was formed under Tennessee law on October 10, 1985. James Carroll (petitioner) purchased the stock of Volunteer on November 8, 1986. Petitioner's accounting firm, Finn & Rose Certified Public Accountants (Finn & Rose), prepared Form 2553, Election by a Small Business Corporation, for Volunteer, to be effective as of November 8, 1986. On January 21, 1987, petitioner, as consenting

shareholder and as an officer of Volunteer, signed the Form 2553 (the original Form 2553) that he had received from Finn & Rose.[2]

Because petitioner's office did not regularly use Form 2553, petitioner gave the executed original Form 2553 to his personal secretary, Janice Gose, for special handling. He gave her the original Form 2553 with his memorandum, which stated:

> 1-21 1987
> To Janice From JRC
> Finn & Rose said this needs to be mailed today.
> Per Dudley [petitioner's counsel herein] mail to:
> IRS Service Center
> Memphis, TN 37501

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[2] There appear to be three related errors on the 1987 Form 2553: First, the question, "Is the corporation an outgrowth or continuation of any form of predecessor?" was answered "No"; second, the date of incorporation shown is Nov. 8, 1986; and third, question A was answered, although it should only be answered if the election takes effect for the first year of the corporation's existence. The answers were given under the belief of Finn & Rose that petitioner had bought the assets of Volunteer and not the stock. Respondent did not challenge the validity of the election on the ground of any of these errors, and we attach no significance to them.

Ms. Gose had worked for petitioner for about 20 years, although she did not work for him at the time of trial. After Ms. Gose received the original Form 2553 and petitioner's memorandum, she prepared an envelope in accordance with petitioner's instructions, made a copy of the original Form 2553 for Volunteer's files, and affixed the necessary postage. Ordinarily, mail was weighed, run through the office postage meter, and left until the end of the day when Ms. Gose bundled it for delivery to the post office by Harold Traylor. However, because the original Form 2553 was a tax form and petitioner had given it to her with a memorandum that it needed to be mailed that day, Ms. Gose gave it special handling. Instead of leaving the envelope containing the original Form 2553 by the postage meter and bundling it with the ordinary mail, Ms. Gose kept it on her desk and handed it to Mr. Traylor. After Ms. Gose saw that Mr. Traylor had left for the post office, she wrote on petitioner's memorandum: "Taken to Post Office by Harold".

Mr. Traylor worked for petitioner from 1985 to 1990. His responsibilities included taking mail to the U.S. post office each day. When Mr. Traylor took ordinary mail to the post office, he dropped it in the drive-through postal box outside the post office, but, if Ms. Gose handed him an envelope and told him that it was important, he dropped it off inside the post office. Mr. Traylor does not remember what he did on January 21, 1987, but he always delivered mail that Ms. Gose gave him on the same day that she gave it to him. Ms. Gose did not prepare the envelope containing the original Form 2553 for mailing by registered mail or certified mail, and Mr. Traylor did not mail it by registered mail or certified mail.

The original Form 2553, mailed on January 21, 1987, was the only Form 2553 mailed to respondent by Volunteer before September 13, 1988. Respondent's search of service center files uncovered no evidence that respondent had received the original Form 2553.

For 1986, the previous owners of Volunteer filed Form 1120, U.S. Corporation Income Tax Return, for Volunteer under Employer Identification Number (EIN) 62-1260837. This Form 1120 does not indicate that it was for a short period or that it was a final return. Respondent has a record of this return in her files. Finn & Rose prepared Form 1120S, U.S. Income Tax Return for an S Corporation, for Volunteer under EIN 62-1298877 for the period November 8, 1986, through December 31, 1986. Although petitioner believes that he filed Volunteer's 1986 Form 1120S, respondent has no record of receiving it.

For 1987 and 1988, Volunteer timely filed, without extensions, Forms 1120S under EIN 62-1298877. Respondent had provided Volunteer with a preprinted label, which included name, address, EIN, and period ending December, 1987. This label was attached to Volunteer's 1987 Form 1120S. The 1987 and 1988 Forms 1120S were initially rejected by respondent, the 1987 Form 1120S by a notice

dated July 21, 1988 (the 1988 notice), and the 1988 Form 1120S by a notice dated July 28, 1989 (the 1989 notice). When petitioner received these notices, he forwarded them to his accountant. On September 13, 1988, petitioner's accountant wrote respondent a letter (the 1988 letter) in response to the 1988 notice. The 1988 letter stated, "We do not understand what the problem is. You did not have any trouble processing the 1986 1120S, [and] you sent a 1987 1120S forms booklet." Attached to the 1988 letter was a copy of page 1 of Volunteer's 1986 Form 1120S and a copy of the original Form 2553. On August 14, 1989, petitioner's accountant wrote respondent a letter (the 1989 letter) in response to the 1989 notice. The 1989 letter asked respondent to correct her records and included copies of the 1988 letter, page 1 of the 1986 and 1987 Forms 1120S, the original Form 2553, the 1988 notice, and the 1989 notice.

In a notice dated September 25, 1989, respondent accepted Volunteer's election to be treated as an S corporation,

effective January 1, 1988. The notice stated:

> IF YOUR EFFECTIVE DATE IS NOT AS REQUESTED, IT WILL HAVE BEEN CHANGED FOR ONE OF TWO REASONS. EITHER YOUR ELECTION WAS MADE AFTER THE 15TH DAY OF THE THIRD MONTH OF THE TAX YEAR TO WHICH IT APPLIES, BUT BEFORE THE END OF THAT TAX YEAR, OR THE ELECTION WHEN SUBMITTED WAS INCOMPLETE, AND REQUESTED INFORMATION WAS RECEIVED AFTER THE FILING PERIOD. IN EITHER CASE, YOUR ELECTION IS INVALID FOR THE TAX YEAR REQUESTED AND HAS THEREFORE, BEEN TREATED AS THOUGH IT WERE MADE FOR THE NEXT TAX YEAR.

The original Form 2553, as executed by petitioner, was complete, and respondent had not requested information from Volunteer prior to the 1988 notice.

Respondent accepted Volunteer's election under a policy of respondent's National Office. The policy provides that if, after the Commissioner sends a corporation a letter rejecting its Form 1120S for a taxable year, the corporation provides a copy of a completed Form 2553 purporting to be

effective for that year, the Commissioner will accept the corporation's election for the next taxable year.[3]

Petitioners reported the following distributive share items from Volunteer on their Forms 1040:

	Ordinary Income (Loss)	Sec. 179
1986	$5,135	
1987	(58,119)	$10,000
1988	1,601	

Volunteer reported the same respective amounts on its 1987 and 1988 Forms 1120S, and the 1986 Form 1120S that was prepared by Finn & Rose showed $5,135 of ordinary income.

Respondent audited petitioners' 1986 joint individual income tax return and did not challenge petitioners' inclusion

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[3] Petitioner has filed a motion to strike the testimony about this policy, which was given by respondent's witness, a Memphis Service Center employee. We will deny that motion. Because we have previously granted respondent's motion to rule that the policy was irrelevant, we would not allow respondent to rely on it to rebut proof that the 1987 Form 2553 was received. The policy is irrelevant to our decision, and our decision would be the same irrespective of whether the testimony were stricken.

of subchapter S pass-through income from Volunteer for 1986.

OPINION

The sole issue for decision is whether Volunteer filed a timely election under section 1362(a) to be an S corporation for 1987. Although petitioner took precautions to ensure that the original Form 2553 was timely mailed, he did not take the added (and, in this case, necessary) precaution of having it sent by registered or certified mail.

In order for Volunteer to have made a timely S election for calendar year 1987, it had to file a signed Form 2553, including the consent of petitioner, before March 15, 1987.[4] Sec. 1362(a)and (b)(1); sec. 18.1362-1(a), Temporary Income Tax Regs., 48 Fed. Reg. 3591-3592 (Jan. 26, 1983). Filing, generally, "is not complete until the document is delivered and

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[4] Although the original Form 2553 was intended to be effective on Nov. 8, 1986, and petitioner reported the income of Volunteer as if a Form 1120S for the period Nov. 8 through Dec. 31, 1986, had been filed, the sole issue before us is whether the original Form 2553 was effective for 1987.

received." United States v. Lombardo, 241 U.S. 73, 76 (1916). Proof that a document has been sent by registered mail or certified mail and that the envelope was properly addressed would have constituted prima facie evidence that the document was delivered. Sec. 301.7502-1(d)(1), Proced. & Admin. Regs. Petitioner, however, did not send the original Form 2553 by certified or registered mail.

Notwithstanding a taxpayer's failure to use certified or registered mail, we have observed that proof that a document was properly mailed will create a "presumption that the document was delivered and 'was actually received by the person to whom it was addressed.'" Estate of Wood v. Commissioner, 92 T.C. 793, 798 (1989) (quoting Hagner v. United States, 285 U.S. 427, 430 (1932) and citing 19 cases supporting that presumption), affd. 909 F.2d 1155 (8th Cir. 1990); see also Anderson v. United States, 966 F.2d 487, 491 (9th Cir. 1992). The presumption of delivery may be rebutted, but not by "mere negative evidence of absence of any record

of receipt". Zaretsky v. Commissioner, T.C. Memo. 1967-247; Anderson v. United States, supra at 492; cf. with 2 Williston, A Treatise on the Law of Contracts, sec. 6:32, at 350-354 (4th ed. 1991) (the common law mailbox rule of contract law in which actual delivery of an acceptance is immaterial to the creation of a contract); Farnsworth, Contracts 184 (2d ed. 1990) (risk that acceptance will be lost in the mails is on the receiving party).

When a taxpayer does not have documentary evidence that a form was mailed, we have allowed indirect evidence to prove that the form was mailed. See Estate of Wood v. Commissioner, supra; Mitchell Offset Plate Service, Inc. v. Commissioner, 53 T.C. 235, 240 (1969); Hiner v. Commissioner, T.C. Memo. 1993-608; cf. Shuford v. Commissioner, T.C. Memo. 1990-422, affd. without published opinion 937 F.2d 609 (6th Cir. 1991) (Commissioner can submit extrinsic evidence to prove timely mailing of notice of deficiency). Evidence of habit is not sufficient to prove

mailing, Hiner v. Commissioner, supra, but direct testimony that a postmark was affixed may be sufficient, Estate of Wood v. Commissioner, supra.

Petitioners have provided considerable evidence that the original Form 2553 was mailed. Ms. Gose recalled that she had prepared the original Form 2553 for mailing and that she had given it to Mr. Traylor to take to the post office. Although Mr. Traylor did not specifically remember the events of January 21, 1987, petitioner provided his memorandum to Ms. Gose, on which, shortly after Mr. Traylor took the original Form 2553 to the post office, she had noted: "Taken to post office by Harold [Traylor]". We believe Mr. Traylor when he said that, if Ms. Gose told him that an envelope was important and needed to be mailed that day, he would have mailed it that day, without fail, by taking it into the post office. Although evidence of office habit is not sufficient to prove mailing, Hiner v. Commissioner, supra; Leather v. Commissioner, T.C. Memo. 1991-534; Parkin v.

Commissioner, T.C. Memo. 1986-59; Ober v. Commissioner, T.C. Memo. 1980-513, the testimony in this case goes beyond mere habit evidence and establishes that the original Form 2553 was mailed.

The Court of Appeals for the Sixth Circuit, to which this case is appealable, has rejected "the judicially-created presumption that material mailed is material received", Miller v. United States, 784 F.2d 728, 730 (6th Cir. 1986) (affg. dismissal of a refund suit), and has held "that the only exceptions to the physical delivery rule for the filing of tax returns are contained in section 7502", Surowka v. United States, 909 F.2d 148, 150 (6th Cir. 1990); see also Deutsch v. Commissioner, 599 F.2d 44, 46 (2d Cir. 1979). Because we see no meaningful distinction between tax returns and tax election forms, petitioners may only rely on the delivery exceptions of section 7502. Golsen v. Commissioner, 54 T.C. 742, 757 (1970), affd. 445 F.2d 985 (10th Cir. 1971).

Section 7502(a) provides that if

> any * * * document reguired to be filed * * * within a prescribed period or on or before a prescribed date * * * is, after such period or such date, delivered by United States mail to the * * * office with which such * * * document is required to be filed, * * * the date of the United States postmark stamped on the cover in which such * * * document * * * is mailed shall be deemed to be the date of delivery * * *

If the original Form 2553 had been delivered by U.S. mail to respondent after March 15, 1987, but had been postmarked before March 15, 1987, the postmark date would have been deemed to be the date on which the form was filed, and the election to be an S corporation would have been timely. Secs. 1362(b)(1), 7502(a)(1); see Combs v. Commissioner, T.C. Memo. 1989-206, affd. without published opinion 907 F.2d 151 (6th Cir. 1990). Petitioner provided evidence that Mr. Traylor took the envelope containing the original Form 2553 to the post office for timely mailing, and we believe that Mr. Traylor did mail it, but "[t]o obtain the

benefit of section 7502, the taxpayer must offer proof of postmark--not mere evidence of mailing". Estate of Wood v. Commissioner, 909 F.2d 1155, 1161 (8th Cir. 1990); see Anderson v. United States, supra at 491 (taxpayer actually saw the postal clerk postmark her return). Although the original Form 2553 was timely mailed, petitioners' evidence was insufficient to prove that the envelope containing the original Form 2553 was postmarked, and petitioners can not invoke section 7502.

In Miller v. United States, supra at 731, the Court of Appeals for the Sixth Circuit stated:

> The only post-section 7502 cases cited in plaintiff's favor are two Tax Court opinions involving subchapter S corporation election filings. Zaretsky v. Commissioner, [T.C. Memo. 1967-247]; Mitchell Offset Plate Service, Inc. v. Commissioner, 53 T.C. 235 (1969). In light of Foerster [v. Commissioner, T.C. Memo. 1981-32], and its reliance on Deutsch [v. Commissioner, 599 F.2d 44 (2d Cir. 1979), affg. an unpublished order of this Court], it is obvious that Zaretsky and Mitchell Offset Plate Service are of questionable

precedential value, at least in the context of obtaining jurisdiction.

In Surowka v. United States, supra at 150, the Court of Appeals for the Sixth Circuit stated:

> Plaintiffs argue that the recent tax court decision in Estate of Wood v. Commissioner of Internal Revenue, 92 T.C. 793 (1989) allows them to prove timely filing of their return by extrinsic evidence. We disagree.
>
> First, the tax court in Wood, unlike this court in Miller, found the judicially-created presumption, that proof of a properly mailed document is received, applied in section 7502 cases. 92 T.C. 798-99. Further, the tax court's holding in Wood that section 7502(c) creates a "safe harbor" for taxpayers who file by registered or certified mail was rejected by this court in Miller, 784 F.2d at 731. More importantly, the tax court in Bruder v. Commissioner, [T.C. Memo. 1989-328], held that Wood's presumption of delivery did not apply to cases appealable to the Sixth Circuit because in Miller, the Sixth Circuit rejected the applicability of any such presumption and held that section 7502 creates the only exceptions to the physical delivery rule.[5]

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[5] Applying the rule of Golsen v. Commissioner, 54 T.C. 742, 757 (1970), affd. 445 F.2d 985 (10th Cir. 1971), in a case appealable to the Court of Appeals for the Sixth Circuit, Bruder v. Commissioner, T.C. Memo. 1989-328, held that the taxpayers' burden of proving that they filed a return

As in Miller v. United States, supra, and Surowka v. United States, supra, petitioners have failed to show that section 7502 applies. Instead, petitioners contend that the preprinted label attached to Volunteer's 1987 Form 1120S proves that the original Form 2553 was actually delivered to respondent. However, petitioners did not show that the original Form 2553 was the only reason, or even the most likely reason, that respondent would have sent the preprinted label attached to Volunteer's 1987 Form 1120S. Although petitioners contend that the label was sent with a Form 1120S package, the label does not indicate the type of form or package with which it was sent. It could have been sent with another package of forms, or it could have been sent in response to Volunteer's 1986 Form 1120S.

In the 1988 letter, Volunteer's accountant stated that Volunteer had received a 1987 Form 1120S package, but at

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was not assisted by any presumption and that the taxpayers needed to prove actual physical delivery.

trial, he was only willing to testify, on the basis of the 1988 letter, that he was "reasonably certain" that Volunteer received a 1987 Form 1120S package. The 1988 letter was prepared 9 months after the 1987 Form 1120S package would have been received by Volunteer, and we do not think Volunteer's accountant would have been much more than "reasonably certain" when he wrote the 1988 letter. Petitioners were unable to draw the necessary connections between the preprinted label and the original Form 2553, and they have not proved that the original Form 2553 was actually delivered to respondent.

Having found petitioners' evidence insufficient to prove timely filing under Miller v. United States, 784 F.2d 728 (6th Cir. 1986), and Surowka v. United States, 909 F.2d 148 (6th Cir. 1990), we conclude by reminding petitioners, other taxpayers, and their counsel, of the way to avoid the risk that timely mailed tax documents will not be received. Section 7502(c) provides that use of registered mail or certified mail

provides prima facie evidence that the document was delivered, and that the date of registration or the date of the U.S. postmark on the certified mail receipt is the delivery date. The additional cost and inconvenience of sending tax forms and communications by registered or certified mail is a small price to pay for the assurance of having proof that those forms and communications will be deemed, for tax purposes, to have been delivered.

To reflect the foregoing,

Decision will be entered for respondent.

Supreme Court, U.S.
FILED
MAY 24 1996
CLERK

(3)

No. 95-1601

In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES R. CARROLL AND DOROTHY A. CARROLL,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under Section 7502 of the Internal Revenue Code, if a document that is required to be filed with the Internal Revenue Service is "delivered by United States mail," the document is deemed to have been filed with the Service on "the date of the United States postmark stamped on the cover" of the mailing envelope. 26 U.S.C. 7502(a)(1). If, by contrast, the document is "sent by United States registered mail," proof of the registration is treated as "prima facie evidence that the * * * document was delivered" to the Service, and the date of registration is then deemed to be "the postmark date." 26 U.S.C. 7502(c)(1). This case presents the following question:

Whether a taxpayer who produces evidence that he mailed a required document by ordinary, rather than registered, mail is entitled to a presumption that the document was delivered to the Internal Revenue Service in a timely manner even though the records of the Service reflect that the document was, in fact, not received.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1601

JAMES R. CARROLL AND DOROTHY A. CARROLL,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 71 F.3d 1228. The opinion of the Tax Court (Pet. Supp. App. 1-21) is reported at 67 T.C.M. (CCH) 2995.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1995. The petition for a writ of certiorari was filed on March 25, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner James Carroll purchased the stock of Volunteer Distribution Co. on November 8, 1986

(Pet. Supp. App. 3). That company had previously filed federal income tax returns as an ordinary business corporation (*id.* at 7). Petitioner, however, desired to elect subchapter S status for Volunteer, which would permit the profits and losses of that corporation to be imputed to him directly and taxed on his individual return (*id.* at 3-4).[1] For a subchapter S election to be effective for the corporation's 1987 tax year, it was necessary for notice of the election to be filed with the Service on or before March 15, 1987 (Pet. Supp. App. 11).[2] See 26 U.S.C. 1362(b)(1)(B); 26 C.F.R. 18.1362-1(a). Internal Revenue Service records, however, reflect that such an election was not received from petitioner during that year (Pet. Supp. App. 6).

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[1] A corporation that has made a valid subchapter S election is generally, with some exceptions, not required to pay tax on its income; instead, the profits and losses of the corporation are imputed directly to the shareholders. An annual information return from the corporation is nonetheless required to establish, *inter alia*, "each shareholder's pro rata share of each item of the corporation" (26 U.S.C. 6037(a)). See generally *Bufferd* v. *Commissioner*, 506 U.S. 523, 526-529 (1993).

[2] The election is to be filed on IRS Form 2253, entitled "Election by a Small Business Corporation." Such an election, once made, is not revocable for any tax year after the 15th day of the third month of that year. 26 U.S.C. 1362(d)(1)(C)(i). The taxpayer is thus not permitted to wait until the end, or close to the end, of the tax year to revoke his election for that year. This prevents the taxpayer from engaging in abusive tax planning by electing subchapter S treatment only for years in which the corporation incurs losses—a practice that would benefit the taxpayer by passing only losses through to his individual return. See H.R. Rep. No. 1445, 95th Cong., 2d Sess. 104 (1978); *McClelland Farm Equipment Co.* v. *United States*, 601 F.2d 365, 367 (8th Cir. 1979) ("[T]his limitation serves to prevent taxpayers from using Subchapter S solely as a tax avoidance mechanism.").

At the conclusion of the 1987 and 1988 income tax years, the corporation filed information returns under 26 U.S.C. 6037, as if a valid subchapter S election had been made (Pet. Supp. App. 7). See note 1, *supra*. Petitioner and his wife claimed the losses of the corporation directly on their joint income tax returns for those years, as if a proper election for subchapter S treatment of the corporation had been made (Pet. App. 3; Pet. Supp. App. 2, 10).

Because the required election had not been filed, however, the Service rejected the information returns filed by the corporation for 1987 and 1988 (Pet. Supp. App. 7-8). When petitioner received the notice that the corporation's information return for 1988 had been rejected, he had his accountant send a copy of the subchapter S election to the Service. Petitioner asserted that the original of that election had been placed in the United States mails, properly addressed to the Internal Revenue Service, on January 21, 1987 (*id.* at 8-9).

b. On September 15, 1988, the Service sent a notice to the corporation that, based upon the election it had received from petitioner's accountant on September 13, 1988, Volunteer would be treated as a valid subchapter S corporation, effective January 1, 1988. That determination was based on the Service's policy of accepting a subchapter S election for a tax year, even though the election was not timely filed, when the corporation supplies a proper election in response to the Service's rejection of an information return that the corporation filed for the prior tax year (Pet. Supp. App. 8-10).

Because the Service had not received a timely subchapter S election from the corporation for 1987, however, the Commissioner disallowed the 1987

losses of the corporation that petitioners claimed directly on their 1987 return. The Commissioner also disallowed a 1987 deduction of the corporation that petitioners sought to carry forward directly onto their 1988 return. As a result of the disallowance of these losses and deductions, the Commissioner asserted a deficiency in income tax against petitioners of approximately $22,500. Petitioners sought review of the deficiency in the Tax Court (Pet. App. 3; Pet. Supp. App. 1-2, 10).

2. Section 7502 of the Internal Revenue Code provides two detailed rules for the timely filing of required tax documents:

(i) Section 7502(a)(1) provides that, if a document is "delivered by United States mail" to the Internal Revenue Service, the document shall be deemed to have been filed with the Service on "the date of the United States postmark stamped on the cover" of the mailing envelope. 26 U.S.C. 7502(a)(1).

(ii) Section 7502(c)(1) provides that, if a tax document is "sent by United States registered mail," a receipt for the registration is "prima facie evidence that the * * * document was delivered" to the office to which it was addressed. 26 U.S.C. 7502(c)(1)(A). It further provides that the date of registration shall be treated as if it were the "postmark date" (26 U.S.C. 7502(c)(1)(B)) and is thus to be "deemed to be the date of delivery" (26 U.S.C. 7502(a)(1)).

3. a. In the Tax Court, petitioner testified that on January 21, 1987, he signed the required election form and gave it to his secretary for mailing (Pet. App. 2; Pet. Supp. App. 3-4). The secretary testified that she prepared the form for mailing by ordinary mail, rather than by registered mail, and gave it to a messenger to take to the post office (Pet. App. 2; Pet.

Supp. App. 5-6). Although the messenger did not remember handling this particular piece of mail, he testified that he habitually took mail to the post office on the same date that it was given to him. He stated that he deposited envelopes prepared for ordinary mail, rather than for certified or registered mail, in a mail receptacle in the post office (Pet. App. 2; Pet. Supp. App. 6, 14-15).

An agent of the Internal Revenue Service testified that a thorough search of the agency's records revealed that the Service did not receive the subchapter S election that petitioner claims to have placed in the mail in 1987. He also explained that, when such an election is received by the Service, it is reviewed for completeness and the corporation is then informed by letter whether the election is in acceptable form. But, neither the election itself, nor a copy of the letter that routinely would have been sent in response to such an election if it had been received by the Service, existed in the agency's records (Tr. 74-78).[3]

b. The Tax Court concluded that the evidence offered by petitioners was sufficient to establish that the subchapter S election form was mailed to the Service on January 21, 1987. The court held, however, that the mere fact that the document was placed in the ordinary mail was not sufficient to establish that the document had been delivered to, and thus filed with, the Service (Pet. Supp. App. 11-21). The court noted that, in *Miller* v. *United States*, 784 F.2d 728 (6th Cir. 1986), and *Surowka* v. *United States*, 909 F.2d 148 (6th Cir. 1990), the Sixth Circuit—to which the appeal in the case would lie—held that only use of

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[3] This witness also acknowledged that documents are sometimes lost by the IRS (Pet. App. 3).

registered mail, under Section 7502(c)(1), permits a presumption of delivery to arise (Pet. Supp. App. 15).

Because an envelope containing the required election that was postmarked *before* the document was due was not "delivered by United States mail to the [Service]" (26 U.S.C. 7502(a)(1)), the court held that petitioners could not rely on Section 7502(a)(1) to establish timely filing (Pet. Supp. App. 16-17, 20). And, because petitioners did not mail the election by registered mail, the court held that they could not rely on the presumption of delivery permitted under Section 7502(c)(1) (Pet. Supp. App. 20-21). The court therefore sustained the deficiencies determined by the Commissioner (Pet. App. 4).

5. The court of appeals affirmed (Pet. App. 1-9). The court stated that, in *Estate of Wood* v. *Commissioner*, 909 F.2d 1155 (8th Cir. 1990), and *Anderson* v. *United States*, 966 F.2d 487 (9th Cir. 1992), the Eighth and Ninth Circuits had held that the common law presumption of delivery that arises from proof that a document was properly placed in the ordinary mail is applicable to tax documents notwithstanding the more narrow provisions of Section 7502 (Pet. App. 6-8). Under the decisions of the Sixth Circuit in *Miller* v. *United States*, *supra*, and *Surowka* v. *United States*, *supra*, however, taxpayers cannot invoke this common law presumption to establish that the Service actually received a document unless, as Section 7502(c) specifies, registered mail was used (Pet. App. 6-8).[4] Because the subchapter S election of the

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[4] Section 7502(c)(2) also permits the Secretary to authorize the use of certified mail for this purpose (26 U.S.C. 7502(c)(2)), which the Secretary has done by regulation (26 C.F.R. 301.7502-1(d)(1)).

corporation had not been "delivered" to the Service in accordance with Section 7502(a), and had not been sent by registered mail in accordance with Section 7502(c), the court concluded that the election was untimely and that petitioners were therefore liable for the deficiencies asserted by the Commissioner (Pet. App. 9).

ARGUMENT

The courts of appeals have adopted conflicting interpretations of Section 7502 of the Internal Revenue Code. These different interpretations have produced disparate results on the same basic facts. The proper application of the rules concerning the timely filing of documents with the Internal Revenue Service is a recurring matter of substantial importance to the administration of the tax laws—for those rules frequently determine the substantive outcome of tax disputes. Resolution of this recurring issue by this Court is needed to avoid continuing uncertainty and to assure even-handed application of the revenue laws. But, the facts of the present case do not present the precise issue on which the courts of appeals have disagreed. Further review of the decision in this case is therefore not warranted.

1. a. The Internal Revenue Code contains numerous filing requirements that specify a date or time by which the filing must be made. The consequences of a failure to make a timely filing are often significant. For example, a petition filed in the Tax Court after the time specified for filing in 26 U.S.C. 6213(a) may not be considered by that court. And, as is relevant in this case, a subchapter S election that is not timely filed with the Service is ineffective—thereby precluding the shareholders of the corporation from directly

claiming the profits and losses of the corporation on their individual tax returns (and requiring the corporation itself to report and pay any income tax owed from its operations). See Pet. Supp. App. 2-3; note 2, *supra*.

Prior to the enactment of Section 7502 of the Internal Revenue Code in 1954, it was well established that a statutory filing requirement could be satisfied only if the document was both actually and timely received by the "particular officer" specified in the statute. *United States* v. *Lombardo*, 241 U.S. 73, 78 (1916). This requirement has been known as the "physical delivery" rule. See *Anderson* v. *United States*, 966 F.2d 487, 490 (9th Cir. 1992). In *United States* v. *Lombardo*, 241 U.S. at 78, the Court rejected the contention that "the requirement of a statute * * * that a paper shall be filed with a particular officer, [may be] satisfied by a deposit in the post office at some distant place." The Court explained that (*ibid.*):

> [t]o so hold would create revolutions in the procedure of the law and the regulation of rights. In instances it might, indeed, be convenient; in others, and most others, it would result in confusion and controversies; and we would have the clash of oral testimonies for the certain evidence of the paper in the files.

The Court further stated that (241 U.S. at 76-77) (quoting with approval the decision below in that case; citations omitted):

> Filing, it must be observed, is not complete until the document is delivered and received. "Shall file" means to deliver to the office and not send through the United States mails. * * * A paper

> is filed when it is delivered to the proper official and by him received and filed. * * * Anything short of delivery would leave the filing a disputable fact * * *.

Under this "physical delivery" rule, a document that was timely mailed but not timely received was not to be treated as having been timely filed. *Phinney* v. *Bank of Southwest National Ass'n*, 335 F.2d 266, 268 (5th Cir. 1964). Prior to the enactment of Section 7502, however, some courts had departed from the requirement of proof of "physical delivery" by holding that proof of "due mailing is prima facie evidence of receipt" that may be rebutted by actual evidence of non-receipt (*Crude Oil Corp.* v. *Commissioner*, 161 F.2d 809, 810 (10th Cir. 1947)); see *Arkansas Motor Coaches, Ltd.* v. *Commissioner*, 198 F.2d 189, 191 (8th Cir. 1952)). In *Phinney* v. *Bank of Southwest National Ass'n*, 335 F.2d at 268, however, the court noted that, under this Court's decision in *United States* v. *Lombardo*, *supra*, "[m]ailing is not filing."

Against this background, Section 7502 was enacted in 1954 to address concerns about the effect of irregularities in postal delivery on the filing of tax documents. H.R. Rep. No. 1337, 83d Cong., 2d Sess. A434-A435 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 615 (1954); *Bloch* v. *Commissioner*, 254 F.2d 277, 279 (9th Cir. 1958); *Sylvan* v. *Commissioner*, 65 T.C. 548, 551 (1975). Section 7502 provides two statutory exceptions to the "physical delivery" rule:

(i) Section 7502(a) addresses the requirement that the document be received in a timely manner. It applies when a document has been "delivered by United States mail" to the Internal Revenue Service on a

date "after" it was due (26 U.S.C. 7502(a)(1)) and specifies that a document thus delivered shall be deemed to have been filed with the Service on "the date of the United States postmark stamped on the cover" of the mailing envelope (*ibid.*). By its terms, Section 7502(a)(1) applies only when the document has been "delivered by United States mail" to the Service. *Ibid.* The risk that "United States mail" may *not* be "delivered" thus remains on the taxpayer under Section 7502(a)(1).

(ii) Section 7502(c), however, provides a method for the taxpayer to guard against that risk. It provides that, if a tax document is "sent by United States registered mail," a receipt for the registration is to be treated as "prima facie evidence that the * * * document was delivered" to the office to which it was addressed. 26 U.S.C. 7502(c)(1)(A). The statute further provides that the date of registration shall be treated as the "postmark date" of the registered mail (26 U.S.C. 7502(c)(1)(B)) and is thus to be "deemed to be the date of delivery" (26 U.S.C. 7502(a)(1)). Any taxpayer may thus avoid the risk of non-delivery of ordinary mail simply by making use of registered mail and the provisions of Section 7502(c)(1).

b. In the present case, the subchapter S election form that petitioner claims to have mailed by ordinary mail on January 21, 1987, was not "delivered by United States mail to the agency" with a "postmark stamped on the cover" of the mailing envelope that was dated before the form was due (26 U.S.C. 7502(a)(1)). And, it is undisputed that petitioners did not send the election form by registered or certified mail. As the court of appeals correctly held, petitioners are therefore not entitled to relief from the "physical delivery" rule under either of the statutory

exceptions established in Section 7502. Because the subchapter S election was not delivered to the Service for filing in a timely manner in accordance with Section 7502, the belated election was ineffective and the deficiency determination was properly upheld.

2. The decision of the Sixth Circuit in this case is consistent with the prior decisions of that court in *Miller* v. *United States*, 784 F.2d 728 (1986), and *Surowka* v. *United States*, 909 F.2d 148 (1990). In those decisions, as here, the court held that Section 7502 "provides only two exceptions to the physical delivery rule for the filing of tax returns and that a taxpayer cannot invoke the judicially-created presumption that properly mailed material is received." 909 F.2d at 148; 784 F.2d at 731.[5]

The decision in this case is also consistent with the decisions of the Second Circuit in *Deutsch* v. *Commissioner*, 599 F.2d 44, 46 (1979), cert. denied, 444 U.S. 1015 (1980), and *Washton* v. *United States*, 13 F.3d 49, 50 (1993), where that court emphasized that the document "must actually be 'delivered by United States mail' to the IRS, not merely placed in a regular United States mail receptacle" (*ibid.*, quoting 26 U.S.C. 7502(a)(1)). The Second Circuit, like the Sixth Circuit, has expressly rejected the contentions (i) that evidence of "a timely mailing of a return [by ordinary mail] constitutes a timely filing" (13 F.3d at 50) and (ii) that evidence of such mailing can suffice to

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[5] Accord, *H.S. & H. Ltd.* v. *United States*, 18 Cl. Ct. 241, 246 (1989) ("The exceptions by which a taxpayer may prove timely filing are exclusively and completely outlined in § 7502."); *United States* v. *Cope*, 680 F. Supp. 912, 917 (W.D. Ky. 1987) ("The only two exceptions to the * * * physical delivery rule are contained in § 7502.").

establish the statutory requirement that the document be "actually delivered" (599 F.2d at 46).

If the fact that a document had been sent by ordinary mail were sufficient to create a presumption of delivery, Section 7502(c) of the Code would be "strip[ped] * * * of its purpose." *Estate of Wood* v. *Commissioner*, 909 F.2d at 1163 (Lay, C.J., dissenting). There obviously would have been no need for Congress to provide that use of "registered" mail constitutes "prima facie evidence of delivery" under the detailed provisions of Section 7502(c)(1) if the use of ordinary mail were silently entitled to the same presumption. Such an interpretation of Section 7502 would not only be inconsistent with the "physical delivery" rule that preceded enactment of Section 7502 (see pages 8-9, *supra*), it would deprive Section 7502(c) of any rational meaning. The express creation of a presumption of delivery only for tax documents sent by registered mail under Section 7502(c)(1) negates the contention that such a presumption may also apply when tax documents are sent by regular mail.

3. As the court of appeals recognized in this case (Pet. App. 1-2, 6-8), however, these decisions of the Second and Sixth Circuits conflict with decisions of the Eighth and Ninth Circuits.

a. In *Estate of Wood* v. *Commissioner*, the Eighth Circuit concluded that "[t]here is no reason that a presumption of delivery should not apply against the Commissioner under section 7502." 909 F.2d at 1159. The court noted that, prior to the enactment of Section 7502, the common law presumption of delivery that arises from proof of mailing had been applied in cases involving statutory filing requirements for tax documents (see page 9, *supra*). The court reasoned

that neither the history nor text of Section 7502 reflects that Congress desired "to completely displace the common law presumption of delivery" (909 F.2d at 1160).

The court in *Estate of Wood* did not, however, adopt the rule that evidence of mailing would create a presumption of delivery under Section 7502.[6] The court stated that the text of Section 7502 reveals that "[t]he act of mailing is not significant for purposes of the statute but placement of a postmark is." 909 F.2d at 1161. The court opined that (*ibid.*)

> in section 7502 Congress dealt with issues of proof, and determined that a postmark is evidence verifiable beyond any self-serving testimony of a taxpayer who claims that a document was timely mailed.

The court held that "only direct proof of postmark * * * will satisfy the requirements of the act" and concluded that, when such "direct proof of postmark" exists, it establishes "a presumption of delivery, which is rebuttable by the Commissioner." *Ibid.*[7] The court noted, in *Estate of Wood*, that the Commissioner had failed to provide "any positive evidence" to support the assertion that "he did not receive the return" (*id.* at 1157). The court concluded, on the record of that case, that the presumption of delivery had not been rebutted (*ibid.*).

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[6] Indeed, the court stated in *Estate of Wood* that "mere evidence of mailing" would not support a presumption of delivery. 909 F.2d at 1161.

[7] As Chief Judge Lay pointed out in his dissent in *Estate of Wood* v. *Commissioner*, 909 F.2d at 1162, however, "the plain language of the statute relegates the postmark to irrelevancy if the document is not delivered."

b. In *Anderson* v. *United States*, 966 F.2d at 490-491, the Ninth Circuit expressly adopted the rationale of *Estate of Wood* and expressly rejected the contrary decisions of the Second and Sixth Circuits in *Deutsch* and *Miller*. The court concluded in *Anderson* that the requisite "direct evidence" of a timely postmark required by *Estate of Wood* could be based solely on a taxpayer's assertion that "she actually saw the postal clerk stamp her document" (966 F.2d at 491). The court further held in *Anderson* that the "rebuttable presumption" of delivery created by "direct proof of a timely postmark" was *not* rebutted merely by the government's official "records of non-receipt." *id.* at 491-492. The court held that such official evidence did not rebut the presumption of delivery because the government had acknowledged that some "tax documents that had been mailed and delivered" to the Service were thereafter lost. 966 F.2d at 492.

4. Although these courts of appeals have reached conflicting interpretations of Section 7502, the present case is not an adequate vehicle for resolution of that conflict. This is because, under either of the conflicting interpretations of Section 7502 that these courts have adopted, petitioners would not prevail on the facts of this case.

In both *Estate of Wood* and *Anderson*, the courts concluded that a presumption of delivery could arise under Section 7502(a) if there was "direct proof of postmark." 909 F.2d at 1161; 966 F.2d at 491. In the present case, however, the record plainly does not contain any "direct proof of postmark." Instead, the testimony adduced by petitioners establishes, at most, that the document was placed in a mail receptacle on the premises of a post office (Pet. App. 2; Pet. Supp. App. 6, 14-15). Even under the analysis applied by the

Eighth Circuit in *Estate of Wood*—and adopted by the Ninth Circuit in *Anderson*—such "mere evidence of mailing" is not a sufficient basis for a presumption of delivery to arise under Section 7502. *Estate of Wood* v. *Commissioner*, 909 F.2d at 1161; see also *Grable* v. *IRS*, 188 B.R. 595, 596 (Bankr. W.D. Mo. 1995).

Although a clear conflict exists between the decisions of the circuits that have interpreted Section 7502, resolution of that conflict would not affect the disposition of the present case. Under the view of all of the appellate courts that have thus far addressed this issue, the evidence offered by petitioners in this case—"mere evidence of mailing"—would not provide a sufficient basis for petitioners to prevail under the statute.

The present case thus does not present the precise issue on which the circuits have divided. Further review of the decision in this case therefore does not appear warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1996